Supreme Court, U.S.
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NO._____

IN THE
Supreme Court of the United States
October Term, 1996

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

Petitioners

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY MACERI AND ANTONINO ENTERPRISES, INC.	:	CIVIL ACTION NO. 93-3803 (JCL)
Plaintiffs	:	
v.	:	ORDER
ROBERT CIMMINO, et al	:	
Defendants	:	

LIFLAND, District Judge

For the reasons set forth in the accompanying Opinion, IT IS on this 3rd day of March, 1995, **ORDERED** that defendants' motions to dismiss the Complaint for failure to state a cause of action are granted.

IT IS FURTHER ORDERED that the motions of defendant Tomey and defendant Calabrese, Jr. for summary judgment are denied as moot.

IT IS FURTHER ORDERED that all defendants' motions for attorneys' fees and costs are granted. Counsel shall

submit the appropriate certification to support the amount of counsel fees and costs within 30 days.

/s/ John C. Lifland
JOHN C. LIFLAND
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY MACERI AND ANTONINO ENTERPRISES, INC.	:	CIVIL ACTION NO. 93-3803 (JCL)
Plaintiffs	:	**OPINION**
v.	:	
ROBERT CIMMINO, et al	:	
Defendants	:	

LIFLAND, District Judge

Defendants Robert Cimmino, Brian T. McGuirt, Steven T. Boswell, Christos J. Diktas, Diktas & Habeeb, and Gerald A. Calabrese move collectively as "municipal defendants" to dismiss the Complaint for

failure to state a cause of action pursuant to Fed.R.Civ.P. 12(b)6, and for attorneys' fees and costs pursuant to Fed. R. Civ. P. 11. Defendants Thomas Tomey and Gerald Calabrese, Jr. move for dismissal pursuant to Fed. R. Civ. P. 12(b)6 by joining in the municipal defendants' motion, and also move for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs oppose all defendants' motions. For the reasons set forth below, the Court will grant municipal defendants' motion to dismiss the Complaint for failure to state a cause of action; grant defendant Tomey's motion to dismiss the Complaint for failure to state a cause of action; grant defendant Calabrese, Jr.'s motion to dismiss the Complaint for failure to state a cause of action; and award municipal defendants, defendant Tomey and defendant Calabrese, Jr.

attorney's fees and costs.

BACKGROUND

Plaintiff Antonino Enterprises, Inc. ("Antonino"), is a building corporation which has constructed a number of homes in Cliffside Park, New Jersey. Plaintiff Anthony Maceri is the owner of Antonino Enterprises. Defendants are residents and/or officials of Cliffside Park. Much of the relevant background information is set forth in a Letter Opinion of New Jersey Superior Court Judge Benedict E. Lucchi dated April 10, 1991. Judge Lucchi's Opinion concerned the trial of three consolidated cases (Docket numbers L-9350-90, L-04926-90 and L-4927-90) involving the zoning regulations of Cliffside Park. Plaintiff Antonino was plaintiff in two of the cases before Judge Lucchi.

Plaintiff Antonino owns a lot in what was formerly a two-family zone located at 409 Nelson Avenue in Cliffside Park. On August 8, 1989, the municipality adopted a new zoning ordinance which placed plaintiff's lot in an exclusively one-family zone. On September 1, 1989, plaintiff submitted an application to build a two-family home on the lot to defendant Robert Cimmino, a Cliffside Park construction official.

On October 2, 1989, the construction official mistakenly issued a building permit to construct a two-family house. By January 3, 1990, the construction official realized that he had issued the building permit in error and issued a stop-work order for plaintiffs' unfinished home. Plaintiff then applied to the Cliffside Park Board of Adjustment for variances which would allow him to

continue construction.

On February 26, 1990, plaintiff presented testimony to the Board of Adjustment in an effort to obtain the necessary variances. On April 23, 1990, the Board voted to deny plaintiff's application for variances. By this time, Plaintiff's house was largely completed. Plaintiff subsequently instituted suits challenging the adoption process of the Cliffside Park zoning ordinance, and seeking to have the building permit reinstated. Defendant Gerald Calabrese was a defendant in the state court litigation, along with Frank Pollotta (identified as a Cliffside Park construction official) and the Cliffside Park Board of Adjustment. Defendants McGuirt, Boswell, Diktas, Diktas & Habeeb, Tomey, Calabrese & Company Realty, Inc., and Gerald Calabrese, Jr., were not

defendants in the state court litigation.

Plaintiff asserted that the zoning ordinance was improperly adopted under New Jersey law. The state Court disagreed, and noted that plaintiffs were in violation of certain zoning requirements under either the former or present zoning ordinance, and that plaintiff would therefore need a variance to proceed with construction under either ordinance.

Plaintiff alleged that while his application was being rejected by the Board of Adjustment, another property owner received approval to build a two-family home in the same one-family zone. Plaintiff alleged that this showed disparate treatment by the Cliffside Park zoning authcrities. The Court found this claim to be without merit, noting that the issuance of variances is "fact-sensitive", in that a particular structure may be

acceptable at one location and unacceptable at another. The Court further held that estoppel would not operate in plaintiff's favor, because under New Jersey law defendants had a right to revoke plaintiffs' building permit despite the construction official's error and plaintiff's reliance on that error.

Plaintiffs alleged that their due process and equal protection rights were violated and sought relief under the Civil Rights Act. Judge Lucchi found no evidence of bad faith, maliciousness, or discriminatory intent on the part of the defendants and therefore denied the claim. The Court further held that all of plaintiff's claims "not expressly discussed in this opinion" were without merit and therefore denied.

Plaintiff appealed to the Appellate

Division. The Appellate Division affirmed and considered the other arguments raised by plaintiff: that the Board of Adjustment's attorney was also the Planning Board attorney and his involvement in drafting the new zoning Ordinance amounted to a conflict of interest; that Cliffside Park Mayor Gerald A. Calabrese influenced the Board's decision in denying plaintiff's variance application and in granting another homeowner's application; and that the ordinance did not take effect until after the town filed the latest zoning map with the Planning Board. The Appellate Division found each of these arguments to be without merit. The Supreme Court of New Jersey denied certiorari.

On August 24, 1993, defendant filed a Complaint in this Court. The Complaint names the following defendants:

(a) Robert Cimmino, who, in his capacity as the construction official of Cliffside Park, allegedly ordered plaintiffs to remove the structure at 409 Nelson Avenue.

(b) Stephen T. Boswell, who, in his capacity as the Borough Engineer of Cliffside Park, allegedly prepared specifications for the demolition of plaintiff's structure.

(c) Calabrese & Company Realty, a New Jersey real estate brokerage firm; Cliffside Park Mayor Gerald A. Calabrese; Ralph Calabrese, the brother of Mayor Calabrese and president of Calabrese Realty; and Gerald A. Calabrese, Jr., the mayor's son and a Commissioner of the Bergen County Board of Taxation.

(d) Christos J. Diktas, an attorney who allegedly represented both the Board of Adjustment and Mayor Calabrese.

Defendant Diktas allegedly accepted retainers from various municipal entities in violation of his professional obligations as Board of Adjustment attorney.

(e) Diktas & Habeeb, a professional corporation which allegedly received the improper retainers mentioned above.

(f) Thomas Tomey, a resident of Cliffside Park and a neighbor of plaintiff Maceri.

(g) Brian T. McGuirt, the Borough Clerk of Cliffside Park, who allegedly advertised for and read bids for the demolition of plaintiffs' property.

The Complaint generally alleges that defendants conspired to revoke plaintiffs' building permit and that defendants discriminated against plaintiffs by applying the new zoning ordinance to 409 Nelson Avenue while sparing other two-

family structures in the vicinity. Specifically, the Complaint alleges, or seems to allege, that "[u]nlike other property owners and zoning applicants whose projects were approved," plaintiffs did not hire Calabrese Realty as a listing or selling broker for their two-family home. Complaint, ¶16.

The Complaint further alleges that defendants conspired to "injure" plaintiffs by revoking the building permit "without a hearing or other due process"; and that defendants failed to take action against "other projects failing to meet the stricter zoning standards of Ordinance #17-89." Complaint, ¶17.

The Complaint further alleges that defendant Diktas drafted the new zoning ordinance under substantial retainer from the "Governing Body." Complaint, ¶18. Plaintiff claims that when he applied to

the Board of Adjustment for a variance

> defendant Diktas continued to sit as Board Attorney for the Board of Adjustment on plaintiff's variance application and was specifically at the public hearing on February 26, 1990, and in connection with the drafting of the Resolution adopted April 23, 1990. Antonino was thereby denied due process of law. Complaint, ¶20.

The Complaint further alleges that while plaintiffs were appealing the denial of the variance, defendant Gerald A. Calabrese, Jr. "was sitting on the Bergen County Board of Taxation and signing a judgment that Antonino's tax appeal. . .had no merit and that the Cliffside Park real estate tax assessment. . .should be affirmed." Complaint, ¶26. Plaintiff Maceri expands on this cryptic assertion in an affidavit: he claims that when he had applied to the Bergen County Tax Board for a reduction or elimination of the tax assessment against his residence, the

Cliffside Park Tax Assessor "offered to reduce substantially or eliminate altogether the assessment" if plaintiff would withdraw his petition to the New Jersey Supreme Court (plaintiffs argue elsewhere that the "taxing authorities" made this offer). Plaintiff further alleges that when he refused to withdraw his petition, defendant Gerald A. Calabrese Jr. joined with other members of the County Tax Board in signing a Judgement affirming the $80,000 building assessment. See Certification of Plaintiff in Opposition to Motion, ¶22-27.

Plaintiff argues that defendant Calabrese, Jr. "should not have sat or participated in my tax appeal in any way." By participating in the Tax Board's deliberations, defendant Calabrese, Jr. allegedly "drew himself into [the] zoning controversy" in order to "insure the

defeat of [plaintiff's] state court case for relief." Certification, ¶26. Plaintiff's appeal of the Tax Board Judgment is currently pending before the New Jersey Tax Court. Certification, ¶22.

The Complaint further alleges that the ordinance should not have taken effect until it had been duly filed in the office of the County Planning Board. Plaintiffs claim that although defendants filed the ordinance on October 25, 1989, defendants threatened to demolish plaintiff's property on October 2, 1989. Complaint, ¶27.

DISCUSSION

Defendants argue that plaintiffs' claims have been adjudicated in state court and are barred under the Doctrine of res judicata. The Court agrees that all of plaintiffs' constitutional claims regarding the zoning ordinance, its

application to plaintiff, and the alleged conspiracy to apply the ordinance in a discriminatory manner have been adjudicated in state court. Therefore, plaintiffs' claims against defendant Mayor Calabrese are barred under the doctrine of res judicata, as Mayor Calabrese was a defendant in state court. The Court finds that the zoning-related claims against the remaining defendants are barred under the entire controversy doctrine, as outlined below. However, plaintiff's claim against Gerald Calabrese, Jr. alleging a wrongful denial of tax relief has not been adjudicated in state court. Therefore, that tax-related claim is not barred under any preclusionary doctrine.

Res Judicata

"Res judicata ensures the finality of decisions." Brown v. Felsen, 442 U.S. 127, 131 (1940). The doctrine prevents

subsequent litigation of all claims or defenses that were previously available to the parties "regardless of whether they were asserted or determined in the prior proceeding." Id.

The Supreme Court has determined that res judicata is applicable to §1983 actions. Allen v. McCurry, 449 U.S. 90 (1980).

Plaintiffs concede that the following questions have all been adjudicated in state court, and are therefore res judicata in this action: the validity of the ordinance; the Board of Adjustment's denial of plaintiff's application for a variance; and plaintiffs' application for a reinstatement of the building permit. However, plaintiffs allege that their federal claims were never adjudicated in state court. Specifically, plaintiffs assert that the state courts did not

address the equal protection question of whether the municipality could selectively apply the ordinance to plaintiffs' structure while exempting other builders.

The Court disagrees. Plaintiffs' constitutional claims regarding the zoning ordinance and its application to plaintiff clearly have been adjudicated in state court. The Appellate Division opinion addressed plaintiffs' claims of section 1983 discrimination; claims regarding the point at which the ordinance took effect; and claims that the actions of the Board of Adjustment's attorney revealed a conflict of interest. The Information Statement plaintiff filed with the Appellate Division refers to discrimination, denial of equal protection, and the remedies and sanctions available under 42 U.S.C. §§2983 to 1988.

Entire Controversy Doctrine

The remaining defendants argue that plaintiff's action is barred under the entire controversy doctrine. This doctrine holds that "the adjudication of a legal controversy should occur in one litigation in only one court" and that "accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." Cogdell v. Hospital Center, 226 N.J. 7, 25 (1989). The purposes of the doctrine include "the needs of economy and the reduction of waste, efficiency and the reduction of delay, the need for complete and final disposition through the avoidance of piecemeal decisions." Id. (quoting 2 State of New Jersey Constitutional Convention of 1947, Committee on the Judiciary Report §II(J), at 1187 (1947)).

The entire controversy doctrine is a doctrine of judicial fairness. Crispin v. Volkswagenwer, A.G., 96 N.J. 336, 343 (1984). It has been further described as:

> a preclusionary principle intended to prevent the fractionalization of litigation by requiring all claims arising out of or relating to the same transactional circumstances to be joined in the same action. The effect of the doctrine is to preclude a party from withholding from the action for separate and later litigation a constituent component of the controversy even where that component is a separate and independently cognizable cause of action. [Citation omitted].

The doctrine relates to parties as well as non-parties. In Cogdell the Court held that the doctrine "embraces not only joinder of related claims between parties but also joinder of all persons who have a material interest in the controversy." Id. at 26. Also, New Jersey Court Rule 4:30A mandates the joinder of parties: "[n]on-joinder of claims or parties

required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine..."

Plaintiff alleges that all defendants engaged in conduct that deprived him of his civil rights under section 1983. However, plaintiff had a full and fair opportunity to litigate his section 1983 claims in state court. Therefore, the section 1983 claims against the remaining defendants relating to the denial of the zoning variance are barred. Otherwise, plaintiff would be able to render the state court litigation "merely one inning in a whole new ballgame." Blanchard v. Washington Park Building, Inc., 150 N.J. Super. 277 (App. Div. 1977).

Plaintiffs have reiterated their state court claims in a federal complalint

against a combination of old and new defendants. As plaintiffs are in control of the litigation, they bear the burden of their failure to join necessary parties and must suffer the consequences of a fragmentation of the litigation. Gross v. Cohen Dufour & Associates, 273 N.J. Super. 617 (Law Div. 1993).

Constitutional Claims Against Defendant Calabrese, Jr.

Defendant Calabrese, Jr. has moved for summary judgment pursuant to Fed. R. Civ. P. 56. He has also adopted by reference municipal defendants' brief in support of their motion to dismiss for failure to state a cause of action. Therefore, the Court will regard defendant Calabrese, Jr. as moving for 12(b)(6) dismissal as well.

A claim will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) only when, after

viewing the pleading in the light most favorable to the plaintiff and resolving every doubt in favor of the plaintiff, "the pleading fails to state a valid claim for relief." Elysian Federal Sav. Bank v. First Interregional Equity Corp., 713 F. Supp. 737, 740 (D.N.J. 1989). See Bartholemew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986). Under this standard, the Court must look only to the facts alleged in the Complaint. Bissenbach v. Guenther, 588 f.2d 400, 402 (3d Cir. 1978). The Court may then dismiss the Complaint if plaintiff can prove no set of facts which would entitle him to relief. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939 (3d Cir.), cert. denied 474 U.S. 935 (1985).

Defendant Calabrese, Jr. argues that the claims against him are barred by the entire controversy doctrine. As stated

above, the Court agrees that the section 1983 claims arising out of and relating to the denial of the zoning variance are barred. However, the entire controversy doctrine does not bar the claims regarding the denial of plaintiff Maceri's application for tax relief. Plaintiff Maceri alleges that he was offered a quid pro quo: he would receive tax relief in exchange for an agreement to withdraw his appeal of the Superior Court decision. This indicates that the tax-related cause of action arose during the pendency of the zoning-related litigation. Under the entire controversy doctrine "the party whose claim is sought to be barred must have a full and fair opportunity to have fully litigated that claim in the entire action. Cafferata v. Peyser, 251 N.J. Super. 256, 261. The doctrine does not bar related claims that were unknown, or

had not arisen or accrued, at the time of the original action. Fisher v. Yates, 270 N.J. Super. 458.

However, the Court finds that plaintiffs' claim of discriminatory tax assessment fails to state a cause of action. A plaintiff in a section 1983 action may recover both compensatory and punitive damages against any municipal official or employee responsible for a deprivation of federal or constitutional rights. Smith v. Wade, 461 U.S. 30, 35-36 (1983); Carey v. Piphus, 435 U.S. 247 (1978), and may also recover compensatory damages against a municipality. Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981). To establish a cause of action under 42 U.S.C. §1983, two elements must be proved: (1) that defendant acted under color of state law; and (2) that a constitutional right has been denied.

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Phillips v. Trello, 502 F.2d 1000, 1004 (3d Cir. 1974).

Section 1983 authorizes resort to the federal courts whenever state actions, or actions taken under color of state law, allegedly infringe on constitutional rights. As an official of the Bergen County Board of Taxation, defendant Calabrese, Jr. was clearly a state actor. The Complaint alleges that the tax assessor offered to reduce plaintiff's tax assessment if plaintiff would withdraw his petition to the New Jersey Supreme Court, and that the Tax Board subsequently denied plaintiff's tax appeal. However, the Complaint fails to allege that defendant Calabrese,Jr. personally took any action designed to ensure that plaintiff was denied the tax relief he sought. The Complaint does not indicate any connection

between defendant Calabrese, Jr. and the tax assessor, or that the tax assessor's comments can be attributed to defendant Calabrese, Jr. in any way. Thus, the facts alleged, if proved, would not amount to a violation of plaintiffs' constitutional rights. Therefore, the Court will grant defendant Calabrese Jr.'s motion for dismissal pursuant to Rule 12(b)(6).

Rule 11

Defendants move for attorneys' fees and costs pursuant to Fed.R. Civ.P. 11. Rule 11 imposes specific duties upon attorneys practicing before the federal courts. It provides that an attorney who fails to either (1) read the pleading; (2) make a reasonable inquiry into the factual and legal legitimacy of the pleading; or (3) file the pleading only for a proper purpose, shall be sanctioned.

Specifically, Rule 11 provides:

> Every pleading, written motion, and other paper shall be signed by at least one attorney of record...By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a

lack of information or belief.

The standard for testing an attorney's conduct is that of what was objectively reasonable under the circumstances. Simmerman v. Cornino, 27 F.3d 58, 62 (3d Cir. 1994) citing Eavenson, Auchmuty & Greenewald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985). To comply with this standard, counsel "must conduct 'a reasonable investigation of the facts and a normally competent level of legal research to support the presentation.'" Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988) (citing Lieb v. Topstone Indus., 788 F.2d 151, 157 (3d Cir. 1986)). An inquiry is considered reasonable if it provides that party with an objective belief at the time the challenged paper was filed that the claim was well-grounded in law and fact. Bensalem TP. v.

International Surplus Lines Ins. Co., 38 F.3d 1303, 1314 (3d Cir. 1994).

Rule 11 targets abuse, making sanctions appropriate only if "the filing of the complaint constituted abusive litigation or misuse of the court's process." Simmerman, Id., citing Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir.), cert. denied sub nom. Herman Bros., Inc. v. Teamsters Local Union No. 430, 488 U.S. 848, 109 S.Ct. 118, 102 L.Ed. 2d 101 (1988). Thus, the failure of a complaint to withstand a motion to dismiss should not, in and of itself, be thought to establish a Rule 11 violation. Id.

The Court will award costs and fees pursuant to Rule 11. Plaintiff argues that his section 1983 zoning-related claims were not adjudicated in state court, and thus are not barred by res

judicata and the entire controversy doctrine. As set forth above, a review of the state court record reveals that these claims were clearly and finally adjudicated. Plaintiff has no factual basis for asserting otherwise. Regarding the claims against defendant Calabrese, Jr., plaintiff alleges no facts at all to support his section 1983 claim of discriminatory tax assessment. Plaintiff merely alleges that another, unrelated public official offered plaintiff a quid pro quo; that plaintiff declined this offer; and that plaintiff was subsequently denied tax relief.

There is nothing to suggest that plaintiff did not know when he filed his complaint that his zoning-related claims had been adjudicated in state court. There is no support for his claim of discriminatory tax assessment. There is

nothing in plaintiff's pleadings to suggest that he seeks to expand an existing body of law. Therefore, the Court finds that plaintiff's claims are objectively frivolous and untenable, constitute abusive litigation, and warrant an imposition of sanctions.

Dated: March 3, 1995

/s/ John C. Lifland
JOHN C. LIFLAND
United States District Judge

EXCERPTS FROM DISTRICT COURT ORDERS VACATING SANCTIONS

Order Entered June 6, 1996, by John C. Lifland, U.S.D.J.:

* * *

"**ORDERED** that the granting of Rule 11 sanctions in the form of an allowance of counsel fees and costs in favor of defendants and against Frederick L. Bernstein, Esq., personally, as set forth in the Order filed on March 3, 1995, be, and the same is, hereby vacated; . . ."

Order Entered June 27, 1995, by John C. Lifland, U.S.D.J.

* * *

"ORDERED that the application of plaintiffs to vacate the Order of March 3, 1995 imposing Rule 11 sanctions upon the plaintiffs ANTHONY MACERI and ANTONINO ENTERPRISES, INC., be, and the same is, hereby granted; . . . ."